

# Ex. D

(9-1-10 Letter)

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September 1, 2010

**By E-mail**

Lauren Ravkind  
Kenny Nachwalter  
One Congress Plaza  
111 Congress Avenue, Suite 1060  
Austin, Texas 78701

Re: King Drug Direct Purchaser Litigation – Civ. A. No. 06-1797  
Vista Healthplan End Payor Class Action – Civ. A. No. 06-1833  
Apotex Litigation – Civ. A. No. 06-2768  
FTC Litigation – Civ. A. No. 08-2141

Dear Lauren:

I write in response to your letter of August 24, 2010, and to follow-up on our teleconferences on August 25th and 26th, regarding the parties' obligations to log privileged materials in the above-captioned litigation.

First, I wish to confirm our agreement regarding Cephalon's obligation to log privileged communications. In particular, we understand that Direct Purchasers do not object to Cephalon's proposal that it exclude the following from any privilege log in this litigation:

1. materials prepared by or exchanged among and between Cephalon's outside counsels and their staffs only;
2. communications among or between Cephalon's outside counsel and Cephalon's in-house counsel, regardless of the subject matter of those communications;
3. communications among or between Cephalon's counsel (outside or in-house) and other Cephalon employees or agents about this litigation (including the patent claims in the Apotex case), the FTC investigation, and/or the underlying patent litigation; and
4. communications, on or after April 27, 2006 (the date the *King Drug* complaint was filed), among or between Cephalon's outside counsel and outside counsel for the Generic Defendants about this litigation (including the patent claims in the Apotex case).

Wilmer Cutler Pickering Hale and Dorr LLP, 60 State Street, Boston, Massachusetts 02109

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With respect to (2) and (3) above, the parties agree to revisit the scope of these carve-outs if Cephalon affirmatively relies on advice of counsel in this case. In addition, you have asked that Plaintiffs may revisit the agreements set forth in (2) and (3) above for "any [other] reason." Cephalon confirms that it will not object to a request to reopen the discussion about those agreements if the Plaintiffs believe in good faith circumstances have changed necessitating their access to a log of such responsive communications.

With respect to (4) above, Cephalon had additionally proposed that communications among or between Cephalon's outside counsel and outside counsel for the Generic Defendants *about the FTC Investigation* also be excluded from any log. Although the FTC has agreed to this exclusion, and no other party has voiced an objection, the Direct Purchasers object. For the reasons set forth during our call, Cephalon believes Direct Purchasers' demand is completely unjustified. However, in the interest of moving this negotiation along to completion, Cephalon will revisit this issue with the Direct Purchasers when and if it identifies any such communications that are both responsive and need to be withheld or redacted on the basis of a privilege claim.

In light of the foregoing, Cephalon does not object to reciprocal carve-outs for the Direct Purchasers. Cephalon, however, does not speak for its co-defendants. Specifically, as far as Cephalon is concerned, Direct Purchasers need not log:

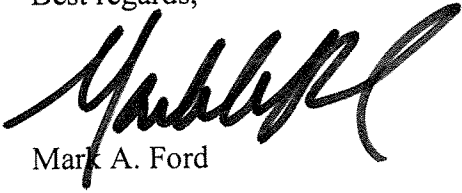
1. materials prepared by or exchanged among a Direct Purchaser's outside counsel and their staffs only;
2. communications among or between a Direct Purchaser's outside counsel and in-house counsel regarding any subject matter;
3. communications among or between a Direct Purchaser's counsel (outside or in-house) and another employee or agent of that Direct Purchaser about this litigation (e.g., communications concerning factual investigation to respond to discovery requests, deposition preparation, trial preparation, document collection, and similar litigation efforts); and
4. communications among or between a Direct Purchaser's outside counsel and outside counsel for another Direct Purchaser or Plaintiff about this litigation (e.g., concerning litigation strategy and coordination).

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With respect to (4), however, for the reasons set forth in Cephalon's September 1, 2010 letter to the FTC, the carve-out does not include communications among or between a Direct Purchaser's outside counsel and counsel for the FTC which took place before the FTC filed suit in federal court on February 13, 2008.

Best regards,

A handwritten signature in black ink, appearing to read 'Mark A. Ford', is written over the typed name.

Mark A. Ford

MAF/djk

CC: James C. Burling  
Distribution (via email)

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